SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 491

BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, *et al.*, *Appellants*

v.

I. WILLIAM BIANCHI, JR., *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

FREDERIC BLOCK
Post Office Professional Building
Port Jefferson, New York 11777
(For Appellee, Bianchi, Jr.)

RICHARD C. CAHN
425 New York Avenue
Huntington, New York 11743
(For Appellees, Sammis and Town of Huntington)

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IN THE

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BOARD OF SUPERVISORS OF SUFFOLK COUNTY, NEW YORK, *et al.*, *Appellants*

v.

I. WILLIAM BIANCHI, JR., *et al.*, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

Question Presented

Was the arbitrary impairment of the votes of most of the citizens of Suffolk County in the election of their representatives to the County Board of Supervisors violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Statement

This action was commenced on July 27, 1962 (R. 1). The complaint sought a declaration that the practice whereby each town supervisor cast one vote as a member of the County Board of Supervisors (herein-

after sometimes referred to as "Board") without regard to the population of the town which he represents, violated the Equal Protection Clause of the Fourteenth Amendment; and requested injunctive relief (R. 9).

The ten towns in Suffolk County ranged in population in 1960 from 1,302 to 172,959.[1] The five western towns contained slightly more than 90% of the population, but under the voting system which prevailed at the commencement of this action cast but 50% of the vote on the Board, with the representatives of the remaining 9% of the population casting the other 50%. By joining with the supervisor of the Town of Smithtown, the five supervisors from the smallest towns could form a coalition representing 18% of the population which could outvote the representatives of the remaining 82%.

Plaintiffs Bianchi and Sammis, respectively residents and qualified voters of the Towns of Brookhaven and Huntington, brought the action in their own behalf and on behalf of all other taxpayers and voters of Suffolk County, against the ten town supervisors in their collective capacity as the Suffolk County Board of Supervisors (R. 2).

On October 17, 1962, the Board moved to dismiss the complaint (R. 11-12). On April 8, 1963, the motion was denied by Hon. Walter Bruchhausen, *D. J.*, with-

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[1] The populations as of 1960, as conceded by the Board (R. 19), were respectively as follows: Babylon, 142,309; Brookhaven, 109,900; Easthampton, 8,827; Huntington, 126,221; Islip, 172,959; Riverhead, 14,519; Shelter Island, 1,302; Smithtown, 50,347; Southampton, 27,095; Southold, 13,295.

out prejudice to its renewal before a three-judge court (217 F. Supp. 166; R. 108-111), which, on June 8, 1963, was ordered into existence by Judge Bruchhausen pursuant to the provisions of 28 U. S. C. 2281 *et seq.* (R. 111-113).

On September 5, 1963, the Board renewed its motion to dismiss the complaint before the three-judge court (R. 113-114), and a hearing was held before that court on September 30, 1963,[2] which resulted in a decision on February 1, 1965, exactly sixteen months thereafter, that the system of representation on the Board violated the Equal Protection Clause of the Fourteenth Amendment (238 F. Supp. 997; R. 123-136).

Judgment was entered on March 3, 1965, denying the motion to dismiss the complaint and denying plaintiffs' application for injunctive relief, but "without prejudice to the renewal in the absence, within a reasonable time, of the political action afforded governmental bodies to be taken as indicated in the Court's decision herein" (R. 137-138).

In essence, the court advised the Board to change its voting structure and retained jurisdiction in the event further proceedings were necessary.

On April 2, 1965, the Board appealed the March 3 order to this Court (R. 138-140). Thereafter, plaintiffs moved to dismiss the appeal because it was not

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[2] The parties stipulated at the hearing that the court might treat the motion to dismiss as a motion for summary judgment "disposing of the issues" (Appellants' brief, Appendix C, p. App. 66). The first portion of the hearing transcript appears at R. 115-123; the balance is printed as Appendix C to Appellants' Brief, pp. App. 25-App. 66.

an appeal from an order "granting or denying . . . an interlocutory or permanent injunction," a jurisdictional prerequisite under 28 U. S. C. Sec. 1253 for direct appeal to this Court from determinations of three-judge district courts (Motion to Dismiss Appeal *sub nom. Griffing* v. *Bianchi,* October, 1965 Term. No. 206).

On October 11, 1965, the motion was granted and the appeal dismissed for lack of jurisdiction (382 U. S. 15; R. 147).

On December 15, 1965 the three-judge court reconvened on plaintiffs' motion, and at that time also granted permission to the Town of Huntington, upon its application, to intervene as a party plaintiff.

By decision (256 F. Supp. 617; R. 189-198), order and judgment (R. 198-199) dated June 15, 1966, the three-judge court again declared the Suffolk government to be unconstitutional and directed, as temporary relief, that each supervisor cast at future meetings of the Board[3] a number of votes equal to the quotient of the population of his town by 5,000 to the nearest whole number, with each supervisor having at least one vote.

The court further directed the Board to submit to it by July 11, 1966 a plan or plans for reconstitution of the county legislature, in order that the court might determine the "probable" validity of any such plan

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[3] Other than on a vote to determine whether or not to appeal from the June 15, 1966 order, which was to be governed by the old one vote per town system (R. 199).

or plans. The court ordered that at least one "probably valid" plan be submitted for approval to the county's voters at the November 8, 1966 general election, so that a proper legislative body may be elected to take office no later than January 1, 1968 (R. 199).

On June 23, 1966, the Board voted to appeal the June 15 order to this Court, but not to seek a stay.[4]

On June 28, 1966, the five least populous (eastern) towns successfully moved to intervene (R. 200-207), but their motion for a stay pending appeal was denied except for a temporary seven-day period in order to apply to a higher authority. Judge Dooling dissented, stating "I would vote against any granting of any stay at all" (transcript of June 28, 1966 hearing, certified to the Court).

The notices of appeal and the application for a stay were filed June 20, 1966. Mr. Justice Black denied the stay on July 2, 1966 (decision on file with the Court).

On August 4, 1966, the lower court entered a supplemental opinion and order passing upon the probable constitutionality of various plans submitted by the Board pursuant to the June 15, 1966 order (Appellants' brief, Appendix D, pp. App. 67-App. 73). On

[4] The Court is respectfully referred to the affidavits of Charles R. Dominy, Supervisor of the Town of Brookhaven, dated July 1, 1966, and John P. Kane, Supervisor of the Town of Huntington, dated July 2, 1966, filed in opposition to the Appellants' application for a stay pending appeal. These affidavits state that the vote against the stay was designed to prevent a stalemate of county government which would occur, if the government, pending this appeal, were to revert to the old one-town, one-vote basis.

August 22, 1966, the Board adopted a resolution to submit a permanent plan to the voters at the November 8, 1966 general election (Appellants' brief, Appendix B, pp. App. 15-App. 20). The plan, based upon modified weighted voting, was approved by the voters on the latter date (Appellants' brief, Appendix B, pp. App. 21-App. 23).

The Jurisdictional Statement was filed August 29, 1966. Appellees moved to affirm or dismiss. The Court noted probable jurisdiction on December 5, 1966 (R. 223).

I

The three-judge court was properly convened.

Though the Court has noted probable jurisdiction, the Appellees believe that discussion of the propriety of the convention of the three-judge court is warranted because (a) the Court has specifically requested argument of this issue in *Dusch* v. *Davis,* No. 724, this Term, which was added to the calendar after the Court noted probable jurisdiction in the present case; (b) the Appellants' brief raises the issue (pp. 26-27), and (c) the Solicitor General has questioned the jurisdiction of the Court in this case in his Memorandum in support of the Petition for a Writ of Certiorari in *Avery* v. *Midland County, Texas,* No. 953, this Term.

The Appellees agree with the Solicitor General's statement of the law, that "where only a local ordinance or a State statute of limited application is sought to be enjoined, convening of a three-judge court

is improper" (Memorandum of Solicitor General, *supra*, pp. 3-4), but the Solicitor General has misconceived the scope of this action and consequently has incorrectly applied this principle to the present case. He is mistaken in his apparent belief that Appellees have only challenged a state statute of limited application.

Suffolk County, in common generally with counties throughout New York State, has always been governed by a board of supervisors comprised of town supervisors, wherein voting was based upon a "one vote per town" concept, regardless of the respective towns' populations.

Prior to 1958 this method of voting was embodied collectively in §20 of the Town Law of the State of New York (59 McKinney's Consolidated Laws of New York Annotated, Town Law, §20), a state statute of general statewide application, which provides that each town of the State shall have an elected supervisor; §150 of the County Law of the State of New York (11 McKinney's Consolidated Laws of New York Annotated, County Law, §150), also a state statute of general statewide application, which provides that "[t]he supervisors of the several cities and towns in each county when lawfully convened, shall constitute the board of supervisors of the county;" and §153, subdivision 4 of the County Law, (11 McKinney's Consolidated Laws of New York Annotated, County Law §153[4]), which requires that all action by the board of supervisors, except where otherwise prescribed "shall be taken by the affirmative vote of a majority of the total membership of the board . . ."

The expressed policy of the State to mandate "one vote per town" on county boards of supervisors, regardless of varying populations, is manifested not only by the state statutes cited above, but also by another statute of statewide application, §10 of the Town Law (59 McKinney's Consolidated Laws of New York Annotated, Town Law, §10) which classifies towns as first and second class towns, according to their population, but without adjusting the votes of towns on boards of supervisors in accordance with the population differences which the State thus obviously recognizes.

Census records show that in every county in New York State there are wide population differences among the towns. (U.S. Department of Commerce, Bureau of the Census, *United States Census of Population 1960, New York, General Population Characteristics,* PC (1) 34 B, N.Y. Table 25, pp. 34-131 through 34-143).

In 1958, pursuant to Article 9, §§1 and 2 of the State Constitution, the State legislature adopted and the public approved a charter form of government for Suffolk (Laws of New York 1958 c. 278), giving the County more "home rule" control over local affairs, but continuing the identical system of voting upon the board of supervisors as had always existed in the County, in accordance with §20 of the Town Law and §§150 and 153(4) of the County Law. This identical system of voting is preserved in §§201 and 203 of the Suffolk County Charter. As noted by Judge Moore in the lower court's February 1, 1965 decision: ". . . the charter preserved the power of a comparatively small percentage of the county's population to elect

a potential majority of the county's legislative body" (R. 128).

Moreover, the general provisions of the County Law continue to govern charter counties to the extent that their charters are not in conflict therewith.[5] As noted above, Suffolk County's Charter provisions relating to voting upon the board of supervisors are not in conflict with the County Law, and, in fact, the statutory system of representation mandated for counties generally by the previously cited sections of the County Law were simply preserved and consolidated by the

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[5] COUNTY LAW OF THE STATE OF NEW YORK (11 McKinney's Consolidated Laws of New York Annotated, County Law)

§ 2. Application of chapter

This chapter shall apply to all counties, except that:

(a) It shall not apply to a county wholly contained within a city, unless specifically so provided;

(b) The provisions of this chapter in so far as they are in conflict with or in limitation of a provision of any alternative form of county government heretofore or hereafter adopted by a county pursuant to section two of article nine of the constitution, or any administrative code, county government law or civil divisions act enacted by the legislature and applicable to such county as now in force or hereafter amended, or in conflict with any local law heretofore or hereafter adopted by a county under an optional or alternative form of county government, shall not be applicable to the county, unless a contrary intent is expressly stated in this chapter.

§ 150. Board of supervisors constituted

The supervisors of the several cities and towns in each county, when lawfully convened, shall constitute the board of supervisors of the county.

§ 153. Rules of procedure

1. A power of the county, whether in terms vested in the county or in the board of supervisors shall, except as otherwise expressly provided, be exercised through a local law or resolution duly adopted by the board.

2. A majority of the duly constituted membership of the

Suffolk Charter. Suffolk's voting system did not change with the adoption of the Charter, but remained in the same form that it had existed for many years.

Thus, not only does §203 of the Charter reflect a statewide policy relating to county board representation, it is actually interchangeable with §§150 and 153 of the County Law. Invalidation of §203 of the Charter, without more, would be a meaningless gesture, since representation would, as always, continue to be governed by the County Law. [See County Law §2(b)]

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board of supervisors shall constitute a quorum for the transaction of business, but a less number may adjourn.

* * *

4. Whenever in this chapter or other general, special or local law, the board of supervisors is authorized or required to act, and no proportion of the voting strength for such action is otherwise prescribed, such action shall be taken by the affirmative vote of a majority of the total membership of the board. * * *

Compare SUFFOLK COUNTY CHARTER (Laws of New York 1958 c. 278)

§ 201. The board of supervisors, general powers.

The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which now are, or may hereafter be, conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this charter.

§ 203. Voting; quorum.

Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. * * *

The New York Court of Appeals has recognized that striking down of the "one vote per town" provisions of a local county charter cannot be accomplished unless §150 *et seq.* of the County Law are simultaneously declared unconstitutional. *Graham* v. *Board of Supervisors,* 18 N.Y. 2d 672 (Court of Appeals, 1966 [Reporter's Notes]). In a related lower court opinion, the court expressly stated that "[t]his court has declared Section 150 of the County Law and Section 201 of the County Charter unconstitutional, insofar as they mandated the former apportionment of the Erie County Board of Supervisors." (*Graham* v. *Board of Supervisors,* 51 Misc. 2d 942, 945-946, 274 N.Y.S.2d 256, 261, [1966]).

The plaintiffs in the present case were always keenly aware that §203 of the Suffolk County Charter and the County Law provisions went hand-in-hand, as evidenced by their complaint, wherein they first request that §203 of the Charter be declared unconstitutional and then "the present practice by virtue of which each defendant casts one vote as a member of the Suffolk County Board of Supervisors." (R. 9-10).

The three-judge court was also keenly aware of the fact that the County Law provisions were necessarily involved in the case, as evidenced by the following colloquy, resulting in an admission by the Suffolk County Attorney that Section 153 was involved:

> "Judge Dooling: Now, this is on the thought that when you get below the state wide level to a matter of purely local concern, and legislatures dealing . . . with matters of local concern rather

than general concern, then you are outside (a) Section 228 [*sic*], Three Judge Courts . . .

Mr. Corwin: That is correct.

Judge Dooling: One thing you didn't mention, 153 Subdivision 4 of the County Law, and we might as well get to that, which again——

Mr. Corwin: Except that it is not before the Court.

Judge Dooling: Isn't it necessarily before the Court because if the section of the charter were invalidated then 153 Subdivision 4 would fill its place and would again require one vote for each supervisor, wouldn't it?

Mr. Corwin: That is true.

Judge Dooling: And that is a state-wide law which applies in the absence, I take it, of any valid provision of any specific charter containing a different vote.

Mr. Corwin: That is true." (Appellants' Brief, Appendix C, pp. App. 28-App. 29)

At this hearing the Attorney General of the State of New York appeared for the express purpose of inquiring into the jurisdiction of the three-judge court, also under the mistaken assumption that the plaintiffs only attacked Section 203 of the Suffolk Charter, as shown in the following colloquy (Appellants' Brief, Appendix C. p. App. 65):

"Mr. Raab: Your Honor, on behalf of the Attorney General, I would make but one request in light of our very limited appearance here.

We were served this morning with plaintiffs' memorandum which in part answers our letter of

the 25th. I have no wish to add to the documents before the Court, but we would like to re-examine the case law in light of Section 153, although I must say at first glance that I don't think that is raised by the pleadings here. However, if we do discover any light that our cases shed on 153, I would like the permission of the Court to submit an additional memorandum or letter to that.

Judge Dooling: I think that plaintiffs' memorandum on the motion that was submitted to Judge Bruchhausen did raise 153, Subdivision 4.

Mr. Block: I think what Mr. Raab is referring to is that we do not specify Section 153 in our complaint. We attack the present system and the system is incorporated in 153.

Judge Dooling: Your argument as submitted originally to Judge Bruchhausen raised 153, Subdivision 4.

Mr. Block: Yes."

(See also Appellants' Brief, Appendix C, pp. App. 26-App. 27, App. 40-App. 41.)

As noted above, the system of County representation here under attack is not unique to Suffolk County (as contrasted with *McMillan* v. *Wagner*, 239 F. Supp. 32, 33-34 [S.D.N.Y., 1965], but is of general state-wide application; and the decision of this Court will directly affect every other county throughout the State except those few coming within the exceptions contained in Section 2 of the County Law, because the State has commanded all such counties to adopt the challenged system of representation. *Cf. Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 228.

Regardless of the name or function of the particular party against whom the injunction is sought, the three-judge court must be convened if that party is "charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves." *Spielman Motor Sales Co. Inc.* v. *Dodge*, 295 U.S. 89, 94.

Thus, it is of no moment that the party sought to be enjoined is a local tax assessor (*City of Cleveland* v. *United States*, 323 U.S. 329), a County District Attorney (*Spielman Motor Sales Co. Inc.* v. *Dodge*, 295 U.S. 89), a local waterfront commission (*Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853, 856 [C.A. 2, 1960]), a Park Commission (*Suncrest Lumber Co.* v. *North Carolina Park Commission*, 29 F. 2d 823, [C.A. 4, 1928]), a city Mayor and Chief of Police (*Watch Tower Bible & Tract Soc.* v. *City of Bristol*, 24 F. Supp. 57, [D. Conn., 1938], *aff'd.* 305 U.S. 572), or even a local bus driver (*Browder* v. *Gayle*, 142 F. Supp. 707 [M.D. Ala., 1956], *aff'd. sub nom. Gayle* v. *Browder*, 352 U.S. 903).

As Mr. Justice Frankfurter stated, for the Court in *Rorick* v. *Board of Commrs. of Everglades Drainage Dist.*, 307 U.S. 208, 212:

> "But what is decisive . . . is not the formal status of the officials sued but the sphere of their functions regarding the matter in issue. An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which 'embodies a policy of statewide concern,' be performing a state function within the meaning [of the statute]."

How then should the Court view an attack upon the very concept of county government that permeates the State of New York? The plaintiffs do far more than challenge specific acts performed by public officers acting pursuant to state statute. They challenge the very authority of the legislative branch of county governments throughout the State, as exemplified by Suffolk County, to act in any and all matters, whether of local or statewide concern, under the system of one vote per town; they challenge the power of the State to delegate any of its powers to any malapportioned municipality; they challenge the right of any municipality to exercise any of its powers, all of which have been delegated to it from the State, if its legislative branch of government votes in accordance with the general statewide policy of one vote per town as commanded in Section 153, Subdivision 4, of the County Law.

Viewed in this context, the present case is hardly one of purely local importance or application. It is clearly the type of proceeding which Congress commanded that a three-judge court must hear.

II

Suffolk County, in common with counties throughout New York State, is a vital unit of government and the nature of its powers requires the application of *Baker* and *Reynolds* to the election of its Legislature.

(a) The Reach of County Government Throughout the United States

There are 3,049 county governments in the United States.[6] Only Connecticut and Rhode Island do not have the county unit.[7] Texas with 254 counties has the greatest number, while Delaware and Hawaii with three each have the fewest.[8] The average number of counties per state is 61[9] with twenty-five states exceeding this number.[10] Generally this average is exceeded by mid-western and southern states while northeastern and western states have fewer than the average.[11]

In terms of population served in 1960 the counties range from a low of 208 in Hinsdale County, Colorado,

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[6] U. S. Department of Commerce, Bureau of the Census: *Governing Boards of County Governments*, G-SS-No. 49, April, 1965, p. 1.

[7] *ibid.*

[8] *id.*, at p. 7.

[9] Blair, *American Local Government* (Harper & Row, New York, Evanston and London, 1964), p. 48.

[10] *ibid.*

[11] *ibid.*

to 6,038,771 in Los Angeles County.[12] The average population of counties in 1962 was 52,135. However, 65 counties, or only 2.1% of the total number, accounted for 37% of the total population in 1960.[13]

There are three basic forms of county government. The most common is the Commission form which is now employed in nearly two-thirds of the counties in 42 states.[14] Its principal feature is that the members of the governing board are elected specifically to fulfill both executive and legislative roles and function only as members of the county government.

The second pattern, as typified by New York State, is the Supervisor form, the distinguishing feature being that the county board is composed of persons first elected as township supervisors and who automatically sit on the county board by virtue of their election to the town position. The size of the board varies greatly in each county, usually correlated to the number of townships within the particular county. Boards of township supervisors with members who represent township (and municipal) governments and have dual accountability as county governing board members and as township (or city) officials are found in 299 counties in 5 states.[15]

The remainder of the counties, for the major part, are governed by Judges and Justices of the Peace Boards, with members who have dual accountability as the county governing board members and as judicial officers (299 counties in 4 states), and Judge and

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[12] *Ibid.*

[13] *Ibid.*

[14] U. S. Department of Commerce, Bureau of the Census: *Governing Boards of County Governments*, G-SS-No. 49, April, 1965, p. 2.

[15] *Ibid.*

Commissioner Boards, consisting of a presiding officer who serves in both this capacity and as a judicial official and other members of the board functioning only as members of the county governing board (322 counties in 4 states).[16]

County governing boards range in size from a single member in 35 counties to 196 in Pulaski County, Arkansas. The average number per county is 7.9 with the vast majority having a three or five member board.[17]

In all but 43 counties the members are elected.[18] There are 24,186 members of county boards in the United States, of which 24,066 are elected and only 120 appointed (or ex officio).[19]

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[16] *ibid.*

[17]

Size of Board	Number of Counties
1 member	35
2 members	15
3 members	1,330
4 members	52
5 members	914
6-9 members	220
10-14 members	92
15-19 members	79
20-50 members	331
50-100 members	49
100 or more	2
Total Number of Boards:	3,049

id., at p. 3.

[18] 533 elected at large; 580 elected at large with local area residence requirement; 1,187 elected from localized areas, either townships or districts. *id.*, at pp. 3-4.

[19]

Total Number of Members	Number Elected	Elected at Large With No Local Area Res. Req.	Elected at Large With Local Area Res. Req.	District as Local Area	Town and Municipality as Local Area
24,186	24,066	2,416	2,239	11,042	8,369

id., at p. 8.

(b) The Nature of County Government in New York State

Counties in New York State, as in other states, carry out the state's policy, exercise the state's power, and are clothed with the state's sovereign immunity within the limits of their delegated power. *Rogers Locomotive Machine Works* v. *American Emigrant Co.*, 164 U. S. 559; *People ex rel. Wakely* v. *McIntyre*, 154 N. Y. 628 (1898); *Markey* v. *County of Queens*, 154 N. Y. 675 (1898); *Baird* v. *Board of Supervisors*, 138 N. Y. 95 (1893); *Horton* v. *Andrus*, 191 N. Y. 231 (1908); *Macrum* v. *Board of Supervisors of County of Suffolk*, 141 Misc. 358, 359-360, 252 N. Y. S. 546 (1931), *aff'd., sub nom. Macrum* v. *Hawkins*, 235 App. Div. 370, 257 N. Y. S. 287 (1932), *reversed on other grounds*, 261 N. Y. 193 (1933), *reargument denied*, 261 N. Y. 691 (1933). The legislature, the source of all county authority, "may resume powers delegated to localities, and assume the direct control of matters pertaining to local government". *Matter of County of Cayuga*, 4 N. Y. 2d 609, 614 (1958); *People ex rel. Morrill* v. *Board of Supervisors*, 112 N. Y. 585, 588 (1889).

There has never been any doubt in New York that counties exist for the purpose of carrying out general governmental purposes. *Horton* v. *Andrus*, 191 N. Y. 231 (1908); *Village of Kenmore* v. *County of Erie*, 252 N. Y. 437, 442 (1930). As provided in the first County Law adopted in the state (Laws of New York, 1892, c. 686, Section 2):

> "A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the

> administration of public affairs conferred upon it by law."

Powers vested in a county are to be exercised for the public benefit and not for the private benefit of the corporate [county] body. *Markey* v. *County of Queens*, *supra*, 154 N. Y. at 687.

Counties have been the repositories of ever increasing power and responsibility. Highway construction and maintenance, originally a town function, became in part a duty of the county in 1890, and county liability for defective highways was imposed in 1917. In 1891 counties were authorized to aid towns and cities in the cost of bridge construction and by 1890 the county was required to contribute to such cost. Home relief administration started as a town and city function, but after some counties constructed poorhouses, the legislature required the others to do the same, in 1824. In 1846 counties were authorized to adopt budgets and appropriations for use during the ensuing fiscal year. Counties have increasingly performed public health functions since 1909. Civil Service rules were extended to include certain county positions in 1900 and in 1941 all county positions. Drake, *History of the County Law*, 11 McKinney's Consolidated Laws of New York, Annotated, 1950, pp. XLI-XLVI.

The growth of county power has paralleled, and been part of, the developing "home rule" movement in New York. One of the earliest discussions of home rule is contained in *People ex rel Morrill* v. *Board of Supervisors*, 112 N. Y. 585, 588 (1889), where the court said:

> "[It is] a general theory of our legislation, that, so far as practicable, matters of administration

specially affecting the public interests of a particular locality should be controlled by the local government. . . . ."

The concept was reaffirmed in *People ex rel Wakely* v. *McIntyre,* 154 N. Y. 628 (1898), and in *Horton* v. *Andrus,* 191 N. Y. 231, 237 (1908).

The County Home Rule Amendment to the New York State Constitution was adopted by the people November 5, 1935. Article 3, Section 26, Constitution of New York, 1894).[20]

Recognizing that the county "is the only unit of government which affects every person in the state", (*Home Rule: Problems Relating to Home Rule and Local Government,* New York State Constitutional Convention Committee, 1938, p. 2), the 1938 Constitutional Convention expanded the County Home Rule provision. The resulting Article 9 Section 2, in common with its predecessor, provided for transfer between the counties and cities, towns and villages of varying functions, subject to the approval of the units affected. On January 1, 1959 and January 1, 1964, Article 9 of the New York State Constitution was amended, providing on each occasion further enlarged home rule functions.

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[20] The Optional Government Law (Laws of New York, 1935, c. 948, effective May 16, 1935), preceded adoption of the County Home Rule Amendment and permitted adoption by a county of one or two alternative plans of government (Section 7-f). Monroe County adopted a county manager form of government which was upheld against a state constitutional challenge, as merely permitting administrative, as contrasted with legislative functions, to be transferred from the board of supervisors to the county manager. *Cort* v. *Smith,* 249 App. Div. 1, 286 N.Y.S. 630 (1936).

During the period 1935 to 1964, New York went through a whirlwind of legislative enactments and repeals, designed to strengthen county government.[21] This recent legislative activity provides dynamic confirmation of New York's traditional view, that—

> "[A] policy of representation by towns has never been adopted or practiced in this state. From the earliest period of our state history, the leading idea has been that the legislature was to directly represent the people, and not the towns or other *quasi*-political corporations contained within the state itself. In cases of representation by towns, the principle was equality among them. Each town was represented, and the number of the population upon such principle was not important. In this state, however, the principle was never adopted. Here we have always had, as a state, the principle of the direct representation of the citizen, and not a representation of him through a corporate body, of which, by his residence, he might happen to be a member. . . . ." *Baird* v. *Board of Supervisors,* 138 N.Y. 95, 103 (1893).

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[21] The first Optional Government Law, added as Article 2A of the County Law of 1909 (Laws of New York 1935, c. 948) was transferred to the separate Optional Government Law by Laws of New York 1950, c. 692. The latter law had been initially adopted by Laws of New York 1937, c. 862; in turn, it was repealed and replaced by the Alternative County Govenment Law (Laws of New York 1952, c. 834). The County Charter Law (Laws of New York 1959, c. 569) was adopted in response to the "ever increasing demands" made on local governments (Memorandum of the Governor, McKinney's Session Laws of New York 1959, p. 1754). By Laws of 1936, c. 843, and Laws of 1964, c. 78, the County Charter Law was repealed and replaced by the Municipal Home Rule Law, containing "uniform grants of power" to all local governments. (Memorandum of Office of Local Government, 35C McKinney's Consolidated Laws of New York [pamphlet] p. XI.)

". . . the policy of the state . . . has plainly been [that] each man or citizen was equal before the law and entitled to the same privileges as any other citizen. . . ." *id.*, at 104.

"We must bear in mind . . . that the policy of the state ever since it has existed as a state, has been in the line of a direct representation of inhabitants as distinguished from their representation through corporations of a quasi-political character." *id.*, at 107.[22]

(c) Suffolk County Exercises Vitally Important State Powers

Section 201 of the Suffolk County Charter (Laws of New York 1958, c. 278, Section 201) constitutes the board of supervisors the "legislative and policy determining body of the county" to have and exercise all powers and duties granted or imposed by boards of supervisors by general state laws applicable to counties generally as well as specific powers conferred upon it by the Charter itself.

The Charter creates many far-reaching County Departments, consistent with the needs of a large explosive county, such as a Civil Service Commission (Article VI), Department of Purchase (Article VII),

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[22] The right of self-government was held to include the right of the electors of the municipalities to elect their county officers. *People ex rel. Bolton* v. *Albertson*, 55 N. Y. 50, 56, (1873). The present New York Constitution, Article 9 Section 1 (a) states: "Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. . . ." The Optional County Government Law, effective for a fifteen year period prior to 1952, contained a provision, Section 703, permitting abolition of towns by the county. This would seem to undercut appellants' "council of towns" argument. See their brief, Point III, pp. 27-37.

Department of Public Works (Article VIII), Department of Health (Article IX), Department of Public Welfare (Article X), Department of Civil Defense (Article XI), Department of Police (Article XII) and Department of Planning (Article XIII).

Section 202, subdivision (7) of the Charter specifically gives the board of supervisors the power to "[m]ake appropriations, levy taxes and incur indebtedness" for the purpose of supporting the operation of these county departments, as well as the power to raise taxes to support all other proper functions prescribed by the Charter or other law.

The best compendium of the powers of county governments as exercised through their legislative branches, which apply to counties generally throughout the State, inclusive of those operating under a Charter form of government, is contained in Section 233(a) of the County Law which itemizes those county purposes for which counties have the power to levy taxes on real estate in any fiscal year in accordance with Section 10 of Article 8 of the Constitution of the State of New York. Just a brief listing of some of these purposes shows the almost awesome extent to which the legislature has delegated its powers to the county level of government in New York State:[23]

Making payments for the reception and custody of prisoners

Public health services

County vocational education expenses

[23] The most recent delegation of State powers of great consequence grants the boards of supervisors the power to "establish . . . county water, sewer, drainage or refuse districts. . . ." County Law, Article 5-A, Section 250 et seq. Laws of 1963, c. 1018; amended L. 1965, c. 1069, L. 1966, c. 307, effective May 10, 1966.

Providing for community colleges

Election expenses

Expenses of county veteran's service agencies

Construction and improvement of bridges and highways

Support of the State judiciary

Maintenance, care and treatment of patients in certain state mental institutions, and costs and expenses incurred in respect to mental illness pursuant to provisions of the State Mental Hygiene Law

Support of a county health district

Support of a county laboratory pursuant to the Public Health Law

Support of State public welfare programs

Support of a public home maintained by a county public welfare district

Construction of erosion-arresting public works projects

Drainage programs pursuant to the Conservation Law.[24]

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[24] The Attorney General and Secretary of State of the State of New York in their brief *amicus curiae* filed in *WMCA Inc.* v. *Lomenzo*, 377 U.S. 633, stated the following: (cited by Stewart, *J.*, 377 U.S. 762, footnote 18 [dissenting opinion]); "For example, state aid is administered by the counties in the following areas: educational extension work (N.Y. Education Law §§ 1104, 1113), community colleges (N.Y. Education Law §§ 6301, 6302, 6304), assistance to physically handicapped children (N.Y. Education Law § 4403), social welfare such as medical and other aid for the aged, the blind, dependent children, the disabled, and other needy persons (N.Y. Social Welfare Law §§ 153, 154, 257, 409), public health (N.Y. Public Health Law §§ 608, 620, 636, 650, 660), mental health (N.Y. Mental Hygiene Law, Art. 8-A, § 191-a), probation work (N.Y. Correction Law § 14-a), highway construction, improvement and maintenance (N.Y. Highway Law §§ 12, 112, 112-a, 279), conservation (N.Y. County Law §§ 219, 299-w, N.Y. Conservation Law §§ 205, 879), and civil defense prepara-

For the exercise during 1967 of these powers, Suffolk County has a final budget of $110,511,594, of which $55,618,420 is to be raised by tax levy. (Final Budget, 1967, County of Suffolk, New York, as adopted by the Suffolk County Board of Supervisors September 14, 1966, pp. M6-M7).

While the Appellees urge the general application of *Baker* and *Reynolds* to local legislative bodies, they specifically assert that the nature and magnitude of governmental functions exercised by the Suffolk County Board of Supervisors, the county's size (910.39 square miles[25] as compared to Rhode Island's 1,214 square miles)[26] and its population, which exceeds that of eight states[27] are more truly determinative of the right of its citizens to have their votes apply equally, than the fact that it bears the name "county" in the discharge of its governmental functions.

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tions (State Defense Emergency Act §§ 23-b, 25-a, McK. Unconsol. Laws, §§ 9125-9130).

"County governments, are, of course, far more than instrumentalities for the administration of state aid. They have extensive powers to adopt, amend or repeal local laws affecting the county (N.Y. County Law §§ 301-309), and also play a vital part in the enactment of state laws which affect only a particular county or counties (see N.Y. Const., Art. IX, §§ 1, 2). The enactment in 1959 of a new County Charter Law (N.Y. County Law, Art. 6-A), providing opportunity for the fundamental reorganization of county governments by county residents has given the counties an even greater role to play in the social economic and political life of modern New York."

[25] R. 18.

[26] Life Pictorial Atlas of the World (Time, Inc., New York: 1961) p. 217.

[27] According to the 1960 Census figures, Suffolk's population of 666,784 (R. 18) exceeded the populations of Hawaii (632,000), New Hampshire (607,000), North Dakota (632,000), Delaware (446,000); Vermont (390,000); Wyoming (330,000), Nevada (285,000) and Alaska (226,000). U. S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States, 1961*, Table 9, p. 12 (figures are to the nearest thousand).

III

The arbitrary impairment of the votes of most of the citizens of Suffolk County in the election of their representatives to the County Board of Supervisors was violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[28] *Reynolds* v. *Sims*, 377 U. S. 533, and cases cited therein at pp. 554-555.

"Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights'. 118 U. S., at 370." *Reynolds* v. *Sims*, *supra*, 377 U. S. at 562.

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[28] The Solicitor General has concluded: "the right to an equal voice in the process of government is not only a personal right but goes to the heart of democracy." [Brief of the United States as *Amicus Curiae* in *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656, pp. 62-68].

The pronouncements in *Baker* v. *Carr*, 369 U. S. 186, and in *Reynolds* v. *Sims*, *supra*, that an arbitrary impairment of one's vote by means of an invidiously discriminatory geographic classification violates the Equal Protection Clause of the Fourteenth Amendment cannot apply exclusively to legislative representation at the state level. A "fundamental political right . . . preservative of all rights" is not transformed into a lesser right because a citizen attempts to assert it at a local level of government.[29] In this respect the Constitution draws no distinction between citizens of the country (*Westberry* v. *Sanders*, 376 U. S. 1), citizens of a state (*Baker* v. *Carr*, *supra*; *Gray* v. *Sanders*, 372 U. S. 368), citizens of a territory (*Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 [D. Hawaii, 1956] *reversed and dismissed as moot*, 256 F. 2d 728 [C. A. 9, 1958], see concurring opinion of Douglas, *J.*, in *Baker* v. *Carr*, *supra*, 369 U. S. at 249) and citizens

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[29] As early as 1776 the right of every town to be represented was vigorously challenged in Massachusetts. A convention of delegates from the towns of Essex County on April 25, 1776, adopted a memorial to the legislature in which it was declared:

> "If representation is equal, it is perfect; as far as it deviates from this equality, so far it is imperfect, and approaches to the state of slavery; and the want of a just weight in representation is an evil nearly akin to being wholly destitute of it. An inequality of representation has been justly esteemed the cause, which has, in a great degree, sapped the foundation of the once admired, but now tottering fabric of the British empire; and we fear that if a different mode of representation from the present is not adopted in this colony, our Constitution will not continue to the late period of time which the glowing heart of every American now anticipates. . . . We cannot realize that our honors, our wise political fathers, have adverted to the present inequality of representation in this colony, to the growth of the evil, or to the fatal consequences which will probably ensue from the continuance of it." Quoted in Luce, *Legislative Principles* (Houghton, Mifflin & Co., Boston, 1930), pp. 343-344.

of a municipality (*Gomillion* v. *Lightfoot*, 364 U. S. 339).

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, this Court, after noting that laws regulating the qualifications of those entitled to vote were always subject to judicial review, stated that this principle "has been more freely extended to the quasi-legislative acts of inferior municipal bodies. . . ." (118 U.S. at 371).

In *Tedesco* v. *Board of Supervisors*, 43 So. 2d 514 (La. Ct. of App. 1949), *appeal dismissed* 339 U. S. 940, an action was brought by a resident and qualified voter of the third municipal district of the City of New Orleans, alleging that voters in five other city districts were afforded greater representation in the city council than the voters in his district. After a trial on the merits the state trial court found a rational basis for the allegedly discriminatory districting. The Louisiana Court of Appeals affirmed and this Court dismissed the appeal to it for the reason which was subsequently explained in *Baker* v. *Carr*, 369 U. S. 186, 235, as follows:[30]

> ". . . no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, *especially as it was urged that there was a rational basis for the challenged districting.*" (emphasis added)

Thus, *Tedesco*, as construed in *Baker* v. *Carr*, appears to hold that a substantial federal question is presented when there exists no rational basis in the

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[30] *cf. Blaikie* v. *Power*, 13 N. Y. 2d 134 (1963), *appeal dismissed*, 375 U. S. 439; see also Silva, *Apportionment in New York*, 30 Fordham L. Rev. 581, 584, note 19 (1962).

exercise of voting rights on a municipal level of government.

In *Gomillion* v. *Lightfoot*, 364 U. S. 339, where the plaintiffs, all Negroes, challenged the constitutionality of an act of the Alabama legislature redefining the boundaries of the City of Tuskegee as "a device to disenfranchise Negro citizens", this Court noted:

> "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." (364 U. S. at 347)

This Court, in *Gomillion*, lists only two areas of municipal activity which have been held to be insulated from federal judicial review: (1) where it is claimed that the State, by virtue of the prohibition against impairment of the obligation of contracts and of the due process clause of the Fourteenth Amendment, is without power to extinguish or alter the boundaries of an existing municipality; and (2) where it is claimed that the State has no power to change the identity of a municipality whereby citizens of a pre-existing municipalty would suffer serious economic disadvantage (364 U. S. at 343). With the exception of these two areas, the Court said that it had

> ". . . never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." (364

U. S. at 344-345; cited in *Baker* v. *Carr*, 369 U. S. at 230).

The majority of this Court in *Gomillion* found a clear violation of the Fifteenth Amendment and thus never had to pass upon the plaintiff's Fourteenth Amendment claim,[31] but the Court in *Baker*, cited *Gomillion* and other cases for the proposition that,

> "When challenges to state action respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted' have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim." (369 U. S. at 186).

Prior to *Gomillion* and *Baker*, the United States District Court for the District of Hawaii, in *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii, 1956), denied a motion to dismiss the complaint in an action by a territorial voter to obtain relief from Congress' failure to reapportion the territorial legislature. In holding that the complaint stated a cause of action under the Equal Protection Clause the court said (McLaughlin, *J.*):

> "Hawaii is a political subdivision of the United States. *It has the same relation to Congress a city or county has to a state. The legislature of the Territory is similar to a county governing board.* It has no sovereignty of its own." (138 F. Supp. at 234; emphasis added.)

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[31] Note, however, Mr. Justice Whittaker's concurring opinion, resting his decision on the Fourteenth Amendment. (364 U. S. at 349).

After thus analogizing the territorial government of Hawaii to the county government of a State, and the territorial legislature to a county board of supervisors, Judge McLaughlin concluded:

> "The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of the traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators." (138 F. Supp. at 236)

After Congress, on August 1, 1956, enacted a new apportionment statute for Hawaii, the *Dyer* case was reversed and dismissed as moot, 256 F. 2d 728 (C. A. 9, 1958), but Judge McLaughlin's language subsequently passed into *Baker* v. *Carr* (concurring opinion, Douglas, *J.*, 369 U. S. at 249).

Appellees submit that the Equal Protection Clause of the Fourteenth Amendment is violated when an elective local governmental body exercising general governmental powers permits representatives who represent approximately 18% of the body's population to enact legislation not favored by approximately 82% of the population, and weighs one citizen's vote at more than 100 times the weight of another's.[32]

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[32] Compare, for example, the population of Shelter Island to that of Islip.

The posture of the Suffolk Board of Supervisors was that its members represented towns without any regard to population, whereas they intended, and purported, to represent the citizens of the county. This resulted in an arbitrary impairment of the votes of those citizens residing in the more populous towns for no reason other than the accident of their residence. Not only was this arbitrary impairment violative of the Equal Protection Clause but it was also contrary to the tradition of the State of New York, and its Constitution. (New York State Constitution, Article 1, Sections 1, 2).

The principles applicable to the state at large must also be applied to that level of elective government[33] which, by direct delegation from the state, exercises the powers of the State.[34]

The county cannot be permitted to exist as an unrepresentative form of government any more than the State can so exist. Otherwise any State legislature could totally evade the effect of *Baker* and *Reynolds*

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[33] The New York State Constitution provides that county legislatures be "elective by the people thereof . . ." (Art. 9, Section 1[a]). In all but 43 of the 3,049 county units of government in the United States, the county legislators are elected. (U. S. Department of Commerce, Bureau of Census, *Governing Boards of County Governments*, G-SS-No. 49, April, 1965, p. 3). The question of whether the State may delegate its general legislative powers to an appointive body, and if it may, whether the Equal Protection Clause as espoused in *Baker* and *Reynolds* would still have application, is not presented by this appeal. The Appellants' brief confuses this question with the issue before the Court. (Appellants' Brief, pp. 33-37).

[34] In *Nixon* v. *Condon*, 286 U. S. 73, 89, this Court referred to political parties and their representatives as "custodians of official power" (286 U. S. at 84), and as "delegates of the State's power" (286 U. S. at 89) and struck down a racially discriminatory political party rule as state action. Counsel in that case had argued, "*Qui facit per alium facit per se*" (286 U. S. at 75)

simply by delegating all or a great part of its powers to unrepresentative counties. Delegation of state powers to unrepresentative elective units of local government is essentially a sophisticated mode of discrimination *exercised on the state legislative level* in direct violation of the mandates of this Court, which forbid "sophisticated as well as simple-minded modes of discrimination" (*Reynolds* v. *Sims*, 377 U. S. at 563).

While in a technical sense the issue presented has not squarely been decided by this Court, application of "one man, one vote" to municipal levels of government is now firmly accepted throughout the country (see this Brief, Point IV *infra*) and is supported by this Court's decisions in *Tedesco, Baker, Gomillion*, and specifically, its language in *Reynolds* (377 U. S. at 575), which language was referred to and adopted as New York's view by Judge Fuld, for the unanimous Court of Appeals in *Seaman* v. *Fedourich*, 16 N. Y. 2d 94, 101 (1965):

> "Political subdivisions of States — counties, cities or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."

Since municipalities possess no independent sovereignty, they are subject to all of the provisions of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment.

Although the Tenth Amendment affords the States an element of sovereignty as to those powers preserved

to them by the Constitution, *Reynolds* v. *Sims*, determined, nonetheless, that such powers cannot be exercised in a fashion that will result in invidious discrimination in voter representation. There is no reason why invidious discrimination resulting from a state's delegation of its powers should constitute an exception to this rule.

IV

Affirmance of the court below would facilitate the orderly transition, already well under way, to constitutional government on the municipal level.

A large and pursuasive body of judicial authority on both the state and federal levels has already adopted the proposition that *Baker* and *Reynolds* extend to local legislative elections. To the best of Appellees' knowledge, the principle has been adopted by either the state or federal courts of at least fifteen states,[35]

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[35] California: *Miller* v. *Board of Supervisors of Santa Clara County*, 46 Cal. Rptr. 617, 405 P. 2d 857, 860 (Supreme Court, 1965).

Hawaii: *Dyer* v. *Kazuhisa Abe*, 138 F, Supp. 220 (D. Hawaii, 1956) *reversed and dismissed as moot*, 256 F.2d 728 (C.A. 9, 1958).

Indiana: *State of Indiana* v. *County of Lake*, National Municipal League, Court Decisions on Legislative Reapportionment Vol. 27, pp. 6-17 (Cause no. 365-785, Superior Court, Lake County, 1966).

Maryland: *Ellis* v. *Mayor and City Council of Baltimore*, 352 F. 2d 123 (C.A. 4, 1965).

Minnesota: *Hanlon* v. *Towey*, 142 N.W. 2d 741 (Supreme Court, 1966).

Mississippi: *Damon* v. *Lauderdale County Election Commissioners*, National Municipal League, Court Decisions on Legislative Reapportionment Vol. 13, p. 139 (Civil Action no. 1197-E D.C.S.D. Miss.; 1964—Mize, *J.*).

Missouri: *Armentrout* v. *Schooler*, National Municipal League,

the courts of one state are undecided[36], and only in Alabama is there opposition[37].

Furthermore, in seven states, county legislators are elected at large with no local area residence requirement.[38] Counting Pennsylvania only once, since it falls

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Court Decisions on Legislative Reapportionment Vol. 27, pp. 1-5 (No. 51856, Supreme Court, Division 1, 1966).

New Jersey: *Mauk* v. *Hoffman*, 87 N.J. Super. 276, 209 A.2d 150 (Superior Court, 1965).

New York: *Seaman* v. *Fedourich*, 16 N.Y. 2d 94 (Court of Appeals, 1965).

Pennsylvania: *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Penn, 1965).

South Dakota: *Bailey* v. *Jones*, 139 N.W. 2d 385 (Supreme Court, 1966).

Tennessee: *Strickland* v. *Burns*, 256 F. Supp. 824 (M.D. Tenn., 1966).

Texas: *Avery* v. *Midland County*, 406 S.W. 2d 422 (Supreme Court, 1966), application to this Court for writ of certiorari pending. The majority of the court below recognized the application of the Equal Protection Clause to the election of local bodies, but reversed the lower court on the grounds that population equality was not the exclusive standard.

Virginia: *Davis* v. *Dusch*, 361 F. 2d 495 (C. A. 4, 1966), to be argued as no. 724 this Term.

Wisconsin: *State ex rel. Sonnenborn* v. *Sylvester*, 26 Wisc. 2d 43, 132 N.W. 2d 249 (Supreme Court, 1965).

[36] Michigan: *Brouwer* v. *Bronkema*, 377 Mich. 616, 141 N.W. 2d 98 (Supreme Court, 1966); *Knudsen* v. *Klevering*, 377 Mich. 666, 141 N.W. 2d 120 (Supreme Court, 1966); *Johnson* v. *Genessee County, Michigan*, 232 F. Supp. 567 (E.D. Mich., 1964); *Sailors* v. *Board of Education*, 254 F. Supp. 17 (W.D. Mich., 1966), to be argued as no. 430 this Term.

[37] Alabama: *Moody* v. *Flowers*, 256 F. Supp. 195 (M.D. Ala., 1966), to be argued as no. 624 this Term.

[38] Maine, Massachusetts, Ohio, Pennsylvania, Utah, Vermont, Wyoming and Oregon, (U. S. Department of Commerce, Bureau of the Census, *Governing Boards of County Governments*, G-SS-No. 49, April, 1965, p. 7).

into both the judicial and "county at large" category,[39] a total of 21 states, or 42%, have recognized, either judicially or legislatively, the principle of voter equality on the local level of government in advance of any direct holding by this Court.[40]

The speed with which the State and its subdivisions have acted to conform the local legislative bodies to the "one man, one vote" principle is strikingly reflected in the recent judicial and legislative activity in New York where a spate of decisions quickly followed the initial ruling of the court below in the present case, uniformly holding that the Equal Protection Clause controlled the election of municipal legislators.[41]

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[39] Pennsylvania, which elects its county legislators at large, has applied the Equal Protection Clause to a school district. *Delozier* v. *Tyrone Area School Board*, 247 F. Supp. 30 (W.D. Penn. 1965).

[40] In *Lucas* v. *Forty-Fourth General Assembly of the State of Colorado*, 377 U.S. 713, 731, n. 21, this Court indicated that some at large elections might present problems, although not necessarily constitutional ones.

[41] *Goldstein* v. *Rockefeller*, 45 Misc. 2d 778, 257 N.Y.S. 2d 994 (April 6, 1965); *Shilbury* v. *Board of Supervisors*, 46 Misc. 2d 837, 260 N.Y.S. 2d 931 (June 26, 1965); *Seaman* v. *Fedourich*, 16 N.Y. 2d 94 (July 9, 1965); *Augostini* v. *Lasky*, 46 Misc. 2d 1058, 262 N.Y.S. 2d 594 (July 20, 1965); *Barzelay* v. *Board of Supervisors*, 47 Misc. 2d 1013, 263 N.Y.S. 2d 854 (November 26, 1965); *Treiber* v. *Lanigan*, 48 Misc. 2d 434, 264 N.Y.S. 2d 797 (November 30, 1965); *Town of Greenburgh* v. *Board of Supervisors*, 49 Misc. 2d 116, 266 N.Y.S. 2d 998, (January 6, 1966); *Dona* v. *Board of Supervisors*, 48 Misc. 2d 876, 266 N.Y.S. 2d 229 (January 17, 1966); *Graham* v. *Board of Supervisors*, 49 Misc. 2d 459, 267 N.Y.S. 2d 383 (January 20, 1966), modified 25 AD 2d 250, 269 N.Y.S. 2d 477, modified 18 N.Y. 2d 672, on remand 51 Misc. 2d 942, 274 N.Y.S. 2d 256; *Michl* v. *Shanklin*, 50 Misc. 2d 460, 270 N.Y.S. 2d 778 (May 7, 1966); *affirmed*, 25 A.D. 2d 925, 270 N.Y.S. 2d 400 (1966); *modified and affirmed*, 17 N.Y. 2d 906 (1966); *Grove* v. *Chemung County Board of Supervisors*, 50 Misc. 2d 418, 270 N.Y.S. 2d 465 (June 6, 1966); *Buisch* v. *Board of Supervisors of Steuben County* (July 13, 1966); *Morris* v. *Board of Supervisors of Herkimer County*, 50 Misc. 2d 929, 273 N.Y.S. 2d 453 (July 13, 1966);

Such unanimity, coupled with the generally accepted New York practice to fashion speedy relief,[42] indicates more than an *assumption* by this state's judiciary that the principle applies to local legislative bodies; it shows *acceptance*.[43]

New York's legislature, itself in the throes of re-

Orlando v. *Board of Supervisors of Genesee County* (July 19, 1966); *Davis* v. *Board of Supervisors of Clinton County* (July 28, 1966); *Iannucci* v. *Board of Supervisors of County of Washington*, (Supreme Court, Washington Co., August 9, 1966); *The Saratogian, Inc.* v. *Board of Supervisors of the County of Saratoga* (Supreme Court, Saratoga Co., August 16, 1966); *Glessing* v. *State of New York and Board of Supervisors of the County of Seneca* (Supreme Court, Seneca Co., July 13, 1966); *Lodico* v. *Board of Supervisors of Rockland County* (D.C. S.D.N.Y., October 11, 1966).

[42] In *Graham* v. *Board of Supervisors*, 49 Misc. 2d 459, 267 N.Y.S. 2d 383, modified 25 A.D. 2d 250, 269 N.Y.S. 2d 477 (1966), modified 18 N.Y. 2d 672 (1966), for example, the summons and complaint were served on December 28, 1965; three weeks later, on January 20, 1966, the Court ordered that Erie County be reapportioned by March 15, 1966.

[43] Possibly this speedy acceptance indicates dissatisfaction, previously unexpressed, with the processes of malapportioned local government. A former mayor of a large American city and now a United States Senator makes no distinction with respect to the evils wrought by malapportionment, whether at the local, state or federal levels: "It is the third branch of government, the legislative, where things have gone awry. Whether we look at city councils, the state legislatures or the Congress of the United States, we react to what we see with scarcely concealed contempt. This is the area where democratic government is breaking down. This is where the vested-interest lobbies tend to run riot, where conflict of interest is concealed from the public, where demagoguery, sophisticated or primitive, knows few bounds, where political lag keeps needed action often a generation behind the times, where the nineteenth century sometimes reigns supreme in committees, where ignorance can be at a premium and wisdom at a discount, where the evil influence of arrogant and corrupt political machines, at the local and state level, ignores most successfully the general welfare, where the lust for patronage and favors for the faithful do the greatest damage to the public interest.

"As a former chief executive of a large American city, as a member of the United States Senate, as a public servant who, in

apportionment,[44] nevertheless passed an amendment to the County Law, vetoed by the Governor, requiring the creation of properly apportioned elective county legislatures,[45] in conformity with the expressed opinion of the State Attorney General.[46]

Implementation of the "one man, one vote" principle by the State's municipalities was cogently reflected at the past general election where voters in 12 of the State's 62 counties approved plans to reapportion their boards of Supervisors.[47]

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both capacities, has been obliged to know a good deal about the workings of state government, I have no hesitation in stating my deep conviction that the legislatures of America, local, state and national, are presently the greatest menace in our country to the successful operation of the democratic process." Joseph S. Clark, *Congress: The Sapless Branch* (New York: Harper & Row, 1964), pp. 22-23.

[44] See *WMCA* v. *Lomenzo*, 239 F. Supp. 916 (S.D.N.Y., 1965), *aff'd.*, 382 U.S. 4.

[45] Senate Bill, Introductory Number 4499, Print Number 5391 (1965 Session), R. 177-184; vetoed by the governor July 20, 1965, R. 175-177. For similar action by a sister state, see Laws of Wisconsin 1965, c. 20, Sec. 59.03 (2)(b): "The county board in each county shall establish and number supervisory districts, after a public hearing, in such a manner that each supervisor shall represent as nearly as practicable an equal number of persons, but considering such other factors as continuity of interest, compactness and contiguity of existing town, village and city lines."

[46] See, for example, statement of Attorney General Lefkowitz of the State of New York, as reported in *Goldstein* v. *Rockefeller*, 45 Misc. 2d 778, 257 N.Y.S. 2d 994 (1965): "[The] equal protection clause does and must apply to local legislative bodies," and the Attorney General's similar position in his brief filed as *amicus curiae* in this case.

[47] Voters in five other counties rejected reapportionment proposals. Two counties had previously approved the creation of new reapportioned county legislatures at the 1965 general election. New York State Office for Local Government Newsletter, Vol. V., No. 21, Albany, N. Y., December 15, 1966, page 1.

There is ample evidence, therefore, that present affirmation by this Court, of a principle which already has been well accepted and applied by local legislatures, will hasten complete conformity by all affected municipalities throughout the country without an undue burden being cast upon the legislative or judicial process.

Since such a substantial segment of the nation has so fully accepted and acted upon the thesis that *Baker* and *Reynolds* apply to protect the citizens' vote at all levels of government, it would be disruptive of local government for this Court now to reverse this trend.

V

The lower court properly imposed a temporary weighted-voting system as interim relief.

This action was commenced July 27, 1962 (R. 1). On February 1, 1965, the three-judge court declared that the Suffolk County Board of Supervisors "is not representative of the voters of the County as the Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause" (R. 134-135), but denied injunctive relief "at this time" in order to allow "a reasonable time [for] political action afforded governmental bodies to be taken" to correct the situation (R. 135, 138).

Nothing was done, either by the state legislature or the Board, to alter the voting or representational sys-

tem.[48] Accordingly, plaintiffs moved on December 7, 1965 to reconvene the three-judge court and for temporary relief (R. 142-150). The Town of Huntington intervened and outlined the Board's non-compliance with the court's mandate (R. 160-163), told the court that the Board "is paralysed in the situation in which it now finds itself" (R. 164) and urged the court to grant an immediate remedy (R. 164).

On June 15, 1966, after a hearing (R. 217, item 22), the court imposed a temporary weighted voting plan upon the Board, saying "It is obvious to the court that there must be a change in the voting power of each of the present County supervisors so as to give to the voter more equal representation in his vote . . . immediate action is imperative [so that a permanent plan untainted by the existing malapportionment may be submitted to the voters without further delay]" (R. 194-195).

The lower court had the power to grant temporary relief in a reapportionment case, and exercised its power properly and commendably here, in view of the refusal of the Board to take any meaningful steps to reapportion itself during a nearly eighteen-month period following the court's February 1, 1965 order. The Board could not reasonably complain that it had not been afforded an opportunity to adopt corrective legislation. *Reynolds* v. *Sims*, 377 U. S. 533, 586.

The lower court's power to fashion temporary equitable relief was so great that it could properly impose as a temporary measure a system of voting which was

[48] Except to take an improvident appeal to this Court, which was dismissed, 382 U.S. 15 (1965); R. 147.

constitutionally impermissible as a permanent plan. *id.* The court's action of June 15, 1966 is unassailable.[49]

VI

This brief takes no position with respect to the constitutionality of Suffolk County's Permanent Reapportionment plan.

Appellees previously moved to dismiss so much of the appeals as challenged the constitutionality of the permanent plan adopted by the Board August 22, 1966 (Appellants' Brief, Appendix B, pp. App. 15-App. 19) and by the people November 8, 1966 (Appellants' Brief, Appendix B, pp. App. 21-App. 23).

In view of the Court's declination to grant Appellees' motion to dismiss, Appellees Sammis and Town of Huntington feel compelled to reach the merits of the permanent plan, which they strongly favor. A separate brief will be filed by the Suffolk County towns of Brookhaven, Islip, Babylon and Smithtown as *amici curiae*, principally addressed to weighted voting as a permanent form of relief, and defending the permanent plan.[50] Appellees

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[49] See original papers on file with the Clerk in connection with appellants' application for a stay pending appeal, which was denied by Mr. Justice Black on July 2, 1966.

[50] This brief does not reach the question whether the reapportionment cases involve other aspects of fair representation than equality of voting rights; whether at any point Guaranty Clause questions intrude to make the issues non-justiciably political; or whether the right protected in these cases is personal [See *Reynolds* v. *Sims, supra*, 377 U. S. at 561; *United States* v. *Bathgate*, 246 U. S. 220, 227; *compare Skinner* v. *Oklahoma*, 316 U. S. 535] or more broadly based.

Sammis and Town of Huntington adopt the arguments in said brief. Appellee Bianchi supports the position of the Appellants with respect to the permanent plan.

CONCLUSION

The order and judgment below of June 15, 1966 should be affirmed.

Respectfully submitted

FREDERIC BLOCK
Post Office Professional Building
Port Jefferson, New York 11777
(For Appellee, Bianchi, Jr.)

RICHARD C. CAHN
425 New York Avenue
Huntington, New York 11743
(For Appellees, Sammis and Town of Huntington)

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